

IN THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF OREGON  
PORTLAND DIVISION

NIKE, INC., an Oregon corporation, Plaintiff, v. VINCE LOMBARDI, JR., an individual; SUSAN LOMBARDI, an individual; and CMG WORLDWIDE, INC., an Indiana corporation, Defendants. ) No. CV-10-389-HU ) OPINION & ORDER )

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1 - OPINION & ORDER

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7 HUBEL, Magistrate Judge:

8 Plaintiff Nike, Inc. brings this action against defendants  
9 Vince Lombardi, Jr., Susan Lombardi, and CMG Worldwide, Inc. The  
10 action against the individual defendants is brought against them as  
11 fifty percent owners of the intellectual property of the late Vince  
12 Lombardi.

13 All parties have consented to entry of final judgment by a  
14 Magistrate Judge in accordance with Federal Rule of Civil Procedure  
15 73 and 28 U.S.C. § 636(c). Defendant CMG moves to dismiss the  
16 action for lack of personal jurisdiction, or alternatively, to  
17 transfer venue. I deny the motion in its entirety.

18 BACKGROUND

19 As alleged in the Complaint, the facts are as follows:  
20 Plaintiff is an Oregon corporation. Vince Lombardi, Jr., resides  
21 in the State of Washington, and Susan Lombardi resides in Florida.  
22 Compl. at ¶¶ 1-3. They each own a fifty percent interest in the  
23 intellectual property related to the late Vince Lombardi, and in  
24 particular, the intellectual property at issue in this case. Id.  
25 at ¶ 4. Together, they do business related to the intellectual  
26 property as the Estate of Vince Lombardi ("the Estate"). Id.

27 CMG Worldwide is an Indiana corporation and is the exclusive  
28 worldwide business representative of the Estate of Vince Lombardi.

1   Id. at ¶ 5. At all times material to the allegations in the  
2 Complaint, CMG was acting as the authorized agent of the Estate and  
3 acted within the scope of its agency. Id.

4       In June 2008, plaintiff approached the Estate, through CMG, to  
5 discuss the possibility of licensing the words and audio recording  
6 of a speech given by the late Vince Lombardi. Id. at ¶ 8.  
7 Plaintiff sought the license to use the speech in a television and  
8 internet advertising campaign. Id.

9       On June 25, 2008, CMG sent plaintiff a draft license agreement  
10 relating to the speech. Id. at ¶ 9. After reviewing the document,  
11 plaintiff informed CMG that the agreement was unacceptable in its  
12 current form. Id. Plaintiff demanded two changes: (1) payment  
13 for the license must be contingent upon the advertisement airing;  
14 and (2) plaintiff would not display any trademark notification on  
15 the advertisement that would be visible to viewers. Id. In the  
16 same written communication, plaintiff stated that the license must  
17 extend to both the words and the voice recording of the late Vince  
18 Lombardi. Id. In addition, plaintiff asked for "confirmation that  
19 Lombardi wrote the speech we want to use, the words were original  
20 to him, and that the Estate owns the copyright to the recording."  
Id.

22       In response, CMG confirmed that it "could make all the  
23 changes" except one related to the time of payment. Id. at ¶ 10.  
24 CMG's failure to specifically reject plaintiff's understanding that  
25 the license would include both the words and voice recording of the  
late Vince Lombardi implied that plaintiff's understanding was  
27 correct. Id.

28       CMG asked plaintiff for the favor of paying the \$150,000

1 license fee before the advertisement ran. Id. at ¶ 11. Plaintiff  
2 was willing to make the payment before the advertisement ran  
3 because plaintiff enjoyed a long-term relationship of trust with  
4 CMG. Id.

5 Plaintiff's representative in charge of the negotiations  
6 informed CMG that plaintiff was satisfied with the agreement as  
7 long as it contained the changes plaintiff had requested. Id. at  
8 ¶ 12. He also informed CMG that he was running out the door on a  
9 personal trip and if he received the agreement before he left he  
10 would sign it immediately; otherwise, the deal would close the  
11 following week. Id.

12 CMG responded that same day, June 25, 2008, by sending an  
13 email to plaintiff stating that the revised agreement contained  
14 "all the changes" plaintiff had requested. Id. at ¶ 13. CMG  
15 followed that email with another email to plaintiff that attached  
16 the license agreement. Id. The license agreement CMG sent to  
17 plaintiff did not contain the agreed-upon changes. Id. It did not  
18 include the requested provision that made payment for the license  
19 contingent upon the advertisement running. Id. Instead, CMG added  
20 language to the license agreement that CMG and plaintiff had never  
21 discussed: it made plaintiff's advance payment for the license  
22 "nonrefundable." Id. Furthermore, CMG did not disclose the fact  
23 that the recording of the speech did not exist. Id. CMG also  
24 failed to include "Schedule A" to the license agreement that would  
25 have revealed that the recording did not exist. Id.

26 Plaintiff relied on CMG's silence and receipt of the license  
27 agreement to support plaintiff's understanding that the Lombardi  
28 voice recording existed and that the Estate had the rights to the

1 speech and the voice recording. Id. at ¶ 14. Plaintiff further  
2 relied on CMG's representations that it had made all the required  
3 changes to the license agreement. Id. As a result, plaintiff's  
4 representative quickly signed the license agreement at his Oregon  
5 office before leaving on his trip. Id.

6 Subsequently, plaintiff discovered that the Estate did not, in  
7 fact, have an audio recording of the speech. Id. at ¶ 15. The  
8 advertisement that was designed with the speech in mind required  
9 such a recording. Id. The mere text of the speech was of no value  
10 to plaintiff. Id.

11 Plaintiff told CMG that the Vince Lombardi voice recording was  
12 material to the license agreement and demanded that the Estate  
13 return the payment that plaintiff made to it under the license  
14 agreement. Id. at ¶ 16. The Estate refused. Id.

15 Based on these allegations, plaintiff brings the following  
16 claims: (1) breach of contract against the Estate with count one  
17 alleging a failure to deliver the promised voice recording and  
18 count two alleging the failure to return the advanced payment; (2)  
19 mutual mistake against the Estate; and (3) fraud against CMG.

20 STANDARDS - MOTION TO DISMISS

21 Under Federal Rule of Civil Procedure 12(b)(2), a defendant  
22 may move for dismissal on the grounds that the court lacks personal  
23 jurisdiction. Plaintiff has the burden of showing personal  
24 jurisdiction. Boschetto v. Hansing, 539 F.3d 1011, 1015 (9th Cir.  
25 2008), cert. denied, 129 S. Ct. 1318 (2009).

26 If the district court decides the motion without an  
27 evidentiary hearing, which is the case here, then the  
plaintiff need only make a prima facie showing of the  
jurisdictional facts.... Absent an evidentiary hearing  
28 this court only inquires into whether the plaintiff's

1       pleadings and affidavits make a prima facie showing of  
 2 personal jurisdiction. . . . Uncontroverted allegations  
 3 in the plaintiff's complaint must be taken as true. . . .  
 . Conflicts between the parties over statements contained  
 in affidavits must be resolved in the plaintiff's favor.

4 *Id.*

5       In diversity cases, the court looks to the law of the state in  
 6 which it sits to determine whether it has personal jurisdiction  
 7 over the nonresident defendant. Western Helicopters, Inc. v.  
Rogerson Aircraft Corp., 715 F. Supp. 1486, 1489 (D. Or. 1989); see  
also Boschetto, 539 F.3d at 1015 ("When no federal statute governs  
 10 personal jurisdiction, the district court applies the law of the  
 11 forum state.").

12       Oregon Rule of Civil Procedure (ORCP) 4 governs personal  
 13 jurisdiction issues in Oregon. Because Oregon's long-arm statute  
 14 confers jurisdiction to the extent permitted by due process, Gray  
& Co. v. Firstenberg Machinery Co., 913 F.2d 758, 760 (9th Cir.  
 16 1990) (citing ORCP 4L; Oregon ex rel. Hydraulic Servocontrols Corp.  
v. Dale, 294 Or. 381, 657 P.2d 211 (1982)), I may proceed directly  
 18 to the federal due process analysis. See Harris Rutsky & Co. Ins.  
Servs., Inc. v. Bell & Clements Ltd., 328 F.3d 1122, 1129 (9th Cir.  
 20 2003) (when state long arm statute reaches as far as the Due  
 21 Process Clause, court need only analyze whether the exercise of  
 22 jurisdiction complies with due process); see also Millennium  
Enters., Inc. v. Millennium Music, LP, 33 F. Supp. 2d 907, 909 (D.  
 24 Or. 1999) (because Oregon's catch-all jurisdictional rule confers  
 25 personal jurisdiction coextensive with due process, the analysis  
 26 collapses into a single framework and the court proceeds under  
 27 federal due process standards).

28       To comport with due process, the nonresident defendant must

1 have certain "minimum contacts with the forum state so that the  
2 exercise of jurisdiction does not offend traditional notions of  
3 fair play and substantial justice." Boschetto, 539 F.3d at 1015.  
4 The forum state may exercise either general or specific  
5 jurisdiction over a nonresident defendant. Id. at 1016.  
6 Ordinarily, the court first engages in the general jurisdiction  
7 analysis. If the contacts are insufficient for a court to invoke  
8 general jurisdiction, the court then applies the relevant test to  
9 determine whether specific jurisdiction exists. In re Tuli, 172  
10 F.3d 707, 713 n.5 (9th Cir. 1999).

11 DISCUSSION - MOTION TO DISMISS

12 Plaintiff concedes that the nature and extent of CMG's  
13 contacts with Oregon are insufficient to subject it to general  
14 jurisdiction. Pltf's Resp. Mem. at p. 3 n.1 Thus, I proceed  
15 directly to the specific jurisdiction analysis.

16 In addition to the facts set forth above, it is relevant to  
17 set forth the additional facts asserted in support of the fraud  
18 claim against CMG. First, plaintiff realleges and incorporates all  
19 of the allegations recited above. Compl. at ¶ 32. Then, plaintiff  
20 alleges as follows:

21 33.

22 In response to NIKE's request that CMG confirm the  
23 existence of and right to license the Lombardi Speech  
24 voice recording, CMG delivered the License Agreement to  
25 NIKE that recites "Licensor is the proprietor of various  
26 copyrights in speeches by Vince Lombardi as well as  
rights . . . associated with the . . . voice and visual  
representation of the late Vince Lombardi . . ." CMG's  
delivery of the License Agreement was a representation to  
NIKE that a voice recording of the Lombardi Speech  
existed and was subject to the License Agreement.

27 34.

Alternatively, CMG's silence in response to NIKE's request that CMG confirm the existence of and right to license the Lombardi Speech voice recording in connection with delivering the License Agreement was a representation by omission.

35.

CMG intended NIKE to rely on CMG's representations about the existence of and the Estate's right to license the Lombardi Speech voice recording. NIKE, in fact, did rely on those representations, forming a belief that the Lombardi Speech voice recording existed. NIKE would not have entered into the License Agreement with the Estate had it known the truth about the voice recording. CMG knew that NIKE believed that audio recording existed. CMG also knew that NIKE had conditioned its acceptance of the License agreement on the existence of such an audio recording.

36.

CMG's representations in paragraphs 33 and 34, above, were false.

37.

CMG acted with at least reckless disregard for the truth about the existence of a voice recording of the Lombardi Speech. In spite of access to the truth about the existence of the Lombardi Speech voice recording, CMG at a minimum recklessly failed to ascertain the truth.

38.

NIKE has been damaged by CMG's fraudulent misrepresentations in an amount to be proven at trial, but in no event less than \$150,000.

*Id.* at ¶¶ 33-38.

Plaintiff first argues that CMG is subject to personal jurisdiction under ORCP 4E(3) which provides that the courts of this state have personal jurisdiction over a defendant "[i]n any action or proceeding which . . . [a]rises out of a promise, made anywhere to the plaintiff . . . by the defendant to deliver . . . within this state . . . goods, documents of title, or other things of value[.]" ORCP 4E(3). Plaintiff argues that the allegations in

1 the Complaint fairly state that CMG promised to deliver to  
 2 plaintiff in Oregon a license to use the voice recording of the  
 3 speech. All of plaintiff's claims arise out of this transaction  
 4 with CMG. According to plaintiff, because of CMG's fraudulent  
 5 promise to deliver a license to the voice recording of the speech,  
 6 plaintiff entered into a licensing agreement it otherwise would not  
 7 have.

8 In Boehm & Co. v. Environmental Concepts, Inc., 125 Or. App.  
 9 249, 865 P.2d 413 (1993), the Oregon Court of Appeals explained  
 10 that

11 although [ORCP 4E(3)] is not based on any prior  
 12 constitutional decisions, it was intended to extend  
 13 personal jurisdiction to the constitutional limits. . .  
 14 Therefore, in applying ORCP 4E(3), we first inquire  
 15 whether it applies to the transaction between the  
 parties. If it does, we next inquire whether that  
 transaction presents sufficient contacts with Oregon that  
 the exercise of jurisdiction does not offend traditional  
 notions of fair play and substantial justice.

16 Id. at 253, 865 P.2d at 415 (citation omitted).

17 The Complaint alleges that CMG's delivery of the license  
 18 agreement which recited that the "licensor" was the proprietor of  
 19 various copyrights in speeches by Vince Lombardi and rights  
 20 associated with the voice and visual representation of Vince  
 21 Lombardi, was a representation to plaintiff that a voice recording  
 22 of the speech existed and was subject to the license agreement.  
 23 Compl. at ¶ 33. Alternatively, plaintiff alleges that CMG's  
 24 silence in response to plaintiff's request that CMG confirm the  
 25 existence of and right to license the speech voice recording in  
 26 connection with the delivery of the license agreement, was a  
 27 representation by omission. Id. at ¶ 34. Based on the allegations  
 28 recited above, plaintiff argues that this is an action which

1 "[a]rises out of a promise," made to plaintiff by CMG to "deliver  
2 . . . within this state . . . goods, documents of title, or other  
3 things of value."

4 CMG contends that the allegations show that it merely signed  
5 an agreement permitting plaintiff to use certain intellectual  
6 property and that as the licensing agent for the Lombardis, it had  
7 no ability or obligation by virtue of the agreement, to deliver  
8 within any jurisdiction and goods, documents of title, or anything  
9 else of value. On the contrary, CMG states, it fulfilled its  
10 obligations under the agreement by permitting plaintiff to use the  
11 intellectual property on or in connection with the advertisement  
12 contemplated by plaintiff and its agents.

13 As indicated, ORCP 4E(3) addresses a promise to deliver in  
14 Oregon "other things of value." Here, the allegations of the  
15 Complaint show that CMG clearly agreed to deliver a license  
16 covering the use of certain rights. Without question, that license  
17 is something of value which CMG sold to plaintiff. This is  
18 sufficient to meet the requirements of ORCP 4E(3).

19 Under Boehm, after determining that ORCP 4E(3) applies to the  
20 transaction at issue, the Court then analyzes whether the  
21 "transaction presents sufficient contacts with Oregon that the  
22 exercise of jurisdiction does not offend traditional notions of  
23 fair play and substantial justice." Boehm, 125 Or. App. at 253,  
24 865 P.2d at 415. Because this question is co-extensive with the  
25 federal due process analysis, I do not separately discuss it.

26 The Ninth Circuit uses a three-part test to determine if a  
27 party has sufficient minimum contacts to be subject to specific  
28 personal jurisdiction consistent with the Due Process Clause:

1                     (1) The non-resident defendant must purposefully direct  
 2 his activities or consummate some transaction with the  
 3 forum or resident thereof; or perform some act by which  
 4 he purposefully avails himself of the privilege of  
 5 conducting activities in the forum, thereby invoking the  
 6 benefits and protections of its laws;

7                     (2) the claim must be one which arises out of or relates  
 8 to the defendant's forum-related activities; and

9                     (3) the exercise of jurisdiction must comport with fair  
 10 play and substantial justice, i.e. it must be reasonable.

Brayton Purcell LLP v. Recordon & Recordon, 606 F.3d 1124, 1128  
 (9th Cir. 2010) (internal quotation omitted).

Plaintiff bears the burden on the first two parts of the test.  
Boschetto, 539 F.3d at 1016. "If the plaintiff establishes both  
 prongs one and two, the defendant must come forward with a  
 'compelling case' that the exercise of jurisdiction would not be  
 reasonable." Id. If plaintiff fails at the first step, "the  
 jurisdictional inquiry ends and the case must be dismissed." Id.

#### I. Purposeful Availment/Purposeful Direction

The Ninth Circuit typically analyzes cases that sound  
 primarily in contract under the "purposeful availment" standard,  
 while those sounding primarily in tort are examined under the  
 "purposeful direction" standard. Id. While this case has both  
 types of claims, the only claim against CMG is one for fraud, a  
 tort claim, triggering the "purposeful direction" analysis.

#### The Ninth Circuit

evaluates purposeful direction using the three-part  
 "Calder-effects" test, taken from the Supreme Court's  
 decision in Calder v. Jones, 465 U.S. 783, 104 S. Ct.  
 1482, 79 L. Ed. 2d 804 (1984). . . . Under this test, the  
 defendant allegedly must have (1) committed an  
 intentional act, (2) expressly aimed at the forum state,  
 (3) causing harm that the defendant knows is likely to be  
 suffered in the forum state. . . . There is no  
 requirement that the defendant have any physical contacts  
 with the forum.

1       Brayton Purcell, 606 F.3d at 1128 (citations and internal quotation  
 2 omitted).

3           Plaintiff argues that defendant is alleged to have committed  
 4 an intentional act by its intentional misleading statement about it  
 5 being the proprietor of various copyrights in speeches, etc., and  
 6 it falsely representing to plaintiff in an email that it had made  
 7 all the changes to the license agreement that plaintiff had  
 8 requested. See Marlyn Nutraceuticals, Inc. v. Improvita Health  
 9 Prods, 663 F. Supp. 2d 841, 850-51 (D. Ariz. 2009) (intentional act  
 10 satisfied based on allegedly fraudulent misrepresentations in  
 11 emails directed to plaintiff in forum); see also Schwarzenegger v.  
 12 Fred Martin Motor Co., 374 F.3d 797, 806 (9th Cir. 2004) (holding  
 13 that placing an ad in a local newspaper constituted an intentional  
 14 act); Bancroft & Masters, Inc. v. Augusta Nat'l, Inc., 223 F.3d  
 15 1082, 1088 (9th Cir. 2000) (finding that the sending of a demand  
 16 letter constituted an intentional act).

17          Plaintiff next contends that CMG expressly aimed its  
 18 fraudulent conduct at Oregon, where it knew that Nike was based.  
 19 Dole Food Co., Inc. v. Watts, 303 F.3d 1104, 1112 (9th Cir. 2002)  
 20 ("Because [defendants] knew that Dole's principal place of business  
 21 was in California, knew that the decision makers for Dole were  
 22 located in California, and communicated directly with those  
 23 California decision makers, we conclude that their actions were  
 24 'expressly aimed' at the forum state"); Marlyn Nutraceuticals, 663  
 25 F. Supp. 2d at 851 (finding "expressly aiming" element satisfied  
 26 based on allegedly fraudulent misrepresentations in emails directed  
 27 to plaintiff in forum).

28          As to the harm element of the "effects" test, plaintiff argues

1 that it has sufficiently alleged harm caused by CMG's  
2 misrepresentations by alleging that it relied on CMG's  
3 representations and would not have entered into the license  
4 agreement had it know the truth about the voice recording, and by  
5 alleging that it was harmed in the amount of \$150,000. Compl. at  
6 ¶¶ 33-38.

7 CMG contends that under the effects test, plaintiff alleges no  
8 willful conduct on the part of CMG that can be characterized as  
9 willfully directing its activities at Oregon. Rather, CMG argues  
10 that it "merely" handled licensing of intellectual property rights  
11 that Nike sought to license from the Lombardis in response to Nike  
12 having contacted CMG in Indiana. CMG states that it did not  
13 advertise, market, or actively seek licensing opportunities in  
14 Oregon. It notes that it "merely" signed an agreement permitting  
15 plaintiff to use the intellectual property rights and notably, that  
16 it did not initiate this contact.

17 CMG also argues that plaintiff is wrong when it asserts that  
18 CMG had an obligation to provide the audio recording under the  
19 license agreement. CMG asserts that CMG asked plaintiff if  
20 plaintiff possessed the audio of the speech and that plaintiff did  
21 not respond to this inquiry. Mark Roesler June 9, 2010 Declr. at  
22 ¶¶ 2-3.

23 While CMG may describe its actions as the "mere" handling of  
24 a request by plaintiff to license intellectual property rights  
25 belonging to the Lombardis, CMG cannot escape the allegations in  
26 the Complaint which indicate that CMG either expressly, or  
27 impliedly, made a misrepresentation regarding the existence of the  
28 voice recording of Vince Lombardi, that CMG allegedly made the

1 misrepresentations in an email sent to plaintiff and in the  
2 attachment to the email, and that CMG knew that it was sending  
3 these communications to plaintiff in Oregon. As noted above, at  
4 this stage of the proceedings, any factual conflicts are resolved  
5 in plaintiff's favor. Thus, these factual assertions by plaintiff  
6 control the analysis.

7 Additionally, as explained in Bancroft & Masters, Calder does  
8 not stand for the "broad proposition" that "a foreign act with  
9 foreseeable effects in the forum state always gives rise to  
10 specific jurisdiction." 223 F.3d at 1087. Rather, it requires  
11 "something more." Id. In the Ninth Circuit, that "something more"  
12 is "express aiming" at the forum state, meaning, "wrongful conduct"  
13 by the defendant "targeted at a plaintiff whom the defendant knows  
14 to be a resident of the forum state." Id. In this case, the  
15 allegations in the Complaint satisfy the "something more"  
16 requirement because the alleged conduct is the intentional  
17 misrepresentations, or omissions, of fact regarding the existence  
18 of the voice recording which were specifically targeted at  
19 plaintiff in Oregon. Thus, this is not an alleged "untargeted" act  
20 of negligence with effects felt in the forum. Calder, 465 U.S. at  
21 789. Rather, it is alleged to be purposeful defrauding of the  
22 plaintiff in Oregon. See also Brainerd v. Governors of the Univ.  
23 of Alberta, 873 F.2d 1257, 1259-60 (9th Cir. 1989) (Arizona court  
24 had specific jurisdiction over Canadian residents who, in response  
25 to telephone calls directed to them in Canada, made statements that  
26 allegedly defamed a person they knew resided in Arizona).

27 Plaintiff sustains its burden of establishing a prima facie  
28 case of "purposeful direction."

1       II. Arising Out Of/Relating to Forum-Related Activities

2           The second prong of the specific jurisdiction analysis asks  
 3 whether the claims made against defendants arise out of their  
 4 forum-related activities. Harris Rutsky, 328 F.3d at 1131. The  
 5 Ninth Circuit uses a "but for" test to make that determination.  
 6 Id. at 1131-32. The relevant question is but for defendant's  
 7 contacts with Oregon, would the claim against defendant have  
 8 arisen? See Ballard v. Savage, 65 F.3d 1495, 1500 (9th Cir. 1995)  
 9 (posing question).

10          Plaintiff easily satisfies this element of the analysis. But  
 11 for CMG's alleged fraudulent conduct, plaintiff would not have  
 12 suffered harm in Oregon and would have no claim.

13       III. Reasonableness

14          If the plaintiff makes a prima facie showing on the first two  
 15 elements of the specific jurisdiction analysis, the burden shifts  
 16 to the defendant to establish a "compelling case" that the exercise  
 17 of jurisdiction would not be reasonable. Boschetto, 539 F.3d at  
 18 1016.

19          The following factors are used to determine if the exercise of  
 20 jurisdiction is reasonable:

21           (1) the extent of the defendants' purposeful interjection  
 22 into the forum state's affairs; (2) the burden on the  
 23 defendant of defending in the forum; (3) the extent of  
 24 conflict with the sovereignty of the defendants' state;  
 25 (4) the forum state's interest in adjudicating the  
 dispute; (5) the most efficient judicial resolution of  
 the controversy; (6) the importance of the forum to the  
 plaintiff's interest in convenient and effective relief;  
 and (7) the existence of an alternative forum.

26 Harris Rutsky, 328 F.3d at 1132.

27           A. Extent of Purposeful Interjection

28          Plaintiff argues that this factor favors it because CMG

1 purposefully interjected itself into Oregon by fraudulently  
2 inducing plaintiff to pay \$150,000 for a license that "turned out  
3 worthless." Pltf's Resp. Mem. at p. 7.

4 CMG suggests that this factor favors it because it did not  
5 advertise, market, or actively seek licensing opportunities in  
6 Oregon, because plaintiff reached out to it, and because it was  
7 "the random, isolated, and fortuitous chance that Nike decided to  
8 use the Lombardi intellectual property that caused the contact with  
9 the State of Oregon rather than by CMG's purposeful availment of  
10 itself." Deft's Mem. at p. 13.

11 This factor favors neither party or weighs slightly in favor  
12 of plaintiff. On the one hand, CMG's argument ignores the nature  
13 of the allegations against it. The Marlyn Nutraceuticals court  
14 faced a similar argument from the defendants in that case. There,  
15 the defendants noted that they had not personally conducted any  
16 business in Arizona and had been accused of only sending emails and  
17 mail to the forum. Marlyn Nutraceuticals, 663 F. Supp. 2d at 853.  
18 The court explained that "[w]ere they accused merely of making  
19 phone calls and sending email, the purposeful injection prong would  
20 likely weigh in their favor." Id. But, the "problem with the  
21 Defendants' argument is that it separates the communications from  
22 their content." Id.

23 The communications are alleged to have conveyed  
24 fraudulent statements that caused Plaintiff, an Arizona  
25 corporation, to take actions which the Defendants must  
26 surely have known would cause it harm. By so doing, the  
27 Defendants purposefully injected themselves into this  
28 forum. See e.g. [Dole, 303 F.3d] at 1114 (finding  
purposeful injection where "[n]ot only did [defendants]  
know that their scheme would injure Dole U.S., which they  
knew had its principal place of business in California,  
but they also engaged in repeated communications with  
Dole managers in California in furtherance of their

1       alleged scheme.").

2 Id. Here, with similar allegations, it can be argued that CMG  
3 purposefully injected itself into the forum.

4       On other hand, plaintiff clearly initiated the contact at  
5 issue here and reached out to CMG to inquire, and hopefully obtain,  
6 certain intellectual property related to Vince Lombardi. Thus, in  
7 the end, this factor is almost evenly balanced or weighs slightly  
8 in favor of plaintiff.

9           B. Burden on Defendant of Defending in Oregon

10          CMG argues that the burden of litigating in Oregon would be so  
11 great as to deprive it of due process, despite modern  
12 communications networks and available transportation. As support,  
13 it states that it is an Indiana corporation with no offices,  
14 employees, property, or interests in Oregon. In a declaration  
15 submitted by Mark Roesler who identifies himself as an employee of  
16 CMG who worked on the license agreement, Roesler states that the  
17 majority of the activities on behalf of the Lombardis were  
18 undertaken in Indianapolis and Los Angeles. Roesler May 10, 2010  
19 Am. Declr. at ¶ 3. He states that CMG conducts no business within  
20 and has no contact with Oregon outside of the negotiation of  
21 license agreements for the use of its various clients' rights of  
22 publicity with plaintiff. Id. at ¶ 4. CMG has no offices,  
23 employees, agents, property or otherwise in Oregon, is not licensed  
24 by the Oregon Secretary of State to do business in Oregon, sells no  
25 products in Oregon, pays no taxes in Oregon, and does not purchase  
26 any materials in Oregon. Id. at ¶ 5.

27          The problem with these statements is that they do not address  
28 the question of the burden of litigating here. Based on the

1 parties' representations, this is not likely a case with an  
2 overwhelming number of documents. According to Roesler, there are  
3 two employees of CMG based on Indianapolis, one in Los Angeles, and  
4 another former employee, Pete Enfield, who, according to counsel  
5 for the Lombardis, resides in Indiana. This is not a substantial  
6 number of people who have to travel to Oregon on behalf of CMG.  
7 While certainly there is some burden on CMG to litigate here simply  
8 because it is not Indianapolis, it is not an extensive burden.  
9 This factor is neutral or favors plaintiff.

10       C. Extent of Conflict with Sovereignty of Indiana

11       This factor is neutral. Neither party identifies any issues  
12 related to this factor.

13       D. Oregon's Interest in Adjudicating the Dispute

14       Oregon's interest is high. CE Distrib., LLC v. New Sensor  
15 Corp., 380 F.3d 1107, 1112 (9th Cir. 2004) ("The forum state has a  
16 substantial interest in adjudicating the dispute of one of its  
17 residents who alleges injury due to the tortious conduct of  
18 another."). This factor favors plaintiff

19       E. Most Efficient Judicial Resolution

20       Evidence and witnesses can be found in both Oregon and  
21 Indiana, as well as at least one CMG witness in California. The  
22 Lombardis prefer that the case stay in Oregon. Cases in the  
23 District of Oregon move through to trial only a few months faster  
24 than those in the Southern District of Indiana. See Deft's Mem. at  
25 p. 15 (citing Judicial Business of the United States - 2007 Annual  
26 Report of the Director 175-180 (showing median period of 21.6  
27 months from date of filing until trial for the District of Oregon  
28 and median period of 28.1 months from the date of filing until

1 trial in the Southern District of Indiana)). This factor is  
2 neutral.

3 F. Importance of the Forum to Plaintiff's  
4 Interest in Convenient and Effective Relief

5 Plaintiff states that Oregon is its home and presents the most  
6 convenient forum for adjudicating its claims against CMG. This is  
7 accurate, but, as the Ninth Circuit has noted, this is not a  
8 particularly important factor. CE Distribution, 380 F.3d at 1112  
9 ("CE chose to adjudicate the litigation in Arizona, its home forum.  
10 Litigating in one's home forum is obviously most convenient. We  
11 have noted, however, that this factor is not of paramount  
12 importance.").

13 This factor favors plaintiff.

14 G. Existence of an Alternative Forum

15 The Southern District of Indiana is an alternative forum and  
16 plaintiff admits that it could pursue its claim against CMG there.  
17 This factor favors CMG.

18 H. Discussion of Reasonableness Factors

19 Of the seven factors, only the existence of an alternative  
20 forum outright favors defendant. Two favor plaintiff (Oregon's  
21 interest in the dispute and the importance and convenience of the  
22 forum to plaintiff). Four are neutral (the extent of the  
23 interjection, burden on defendant to defend here, conflict of law,  
24 efficient judicial resolution), with two of those (the extent of  
25 the interjection and burden on defendant to defend here) possibly  
26 favoring plaintiff.

27 Considered collectively, the analysis dictates a conclusion  
28 that CMG fails to present a compelling case that jurisdiction in

1 Oregon is unreasonable. Plaintiff establishes a prima facie case  
 2 of personal jurisdiction over CMG.

3 STANDARDS - MOTION TO TRANSFER

4 28 U.S.C. § 1404 governs motions to transfer venue:

5 For the convenience of parties and witnesses, in the  
 6 interest of justice, a district court may transfer any  
 7 civil action to any other district or division where it  
 might have been brought.

8 28 U.S.C. § 1404(a). The decision whether to transfer venue lies  
 9 in the discretion of the district court. 28 U.S.C. § 1404; Jones  
v. GNC Franchising, Inc., 211 F.3d 495, 498 (9th Cir. 2000) (under  
 10 section 1404(a), "the district court has discretion to adjudicate  
 11 motions for transfer according to an individualized, case-by-case  
 12 consideration of convenience and fairness.") (internal quotation  
 13 omitted).

14 In determining proper venue, the court considers both public  
 15 and private factors. Creative Tech., Ltd., v. Aztech Sys. Pte.,  
Ltd., 61 F.3d 696, 699 (9th Cir. 1995). Private factors

16 include ease of access to sources of proof; compulsory  
 17 process to obtain the attendance of hostile witnesses,  
 18 and the cost of transporting friendly witnesses; the  
 19 possibility of viewing subject premises; and other  
 20 factors contributing to an expeditious and inexpensive  
 trial.

21 . . .

22 [Public] factors include administrative difficulties  
 23 flowing from court congestion; imposition of jury duty on  
 the people of a community unrelated to the litigation;  
 24 the local interest in resolving the controversy at home;  
 the interest in having a diversity case tried in a forum  
 familiar with the law that governs the action; and the  
 avoidance of unnecessary conflicts of law problems.

25  
 26 Gemini Capital Group, Inc. v. Yap Fishing Corp., 150 F.3d 1088,  
 27 1093, 1094 (9th Cir. 1998).

28 Generally, defendants "must make a strong showing of

1 inconvenience to warrant upsetting the plaintiff's choice of  
2 forum." Decker Coal Co. v. Commonwealth Edison Co., 805 F.2d 834,  
3 843 (9th Cir. 1986).

4 DISCUSSION - MOTION TO TRANSFER

5 CMG states that the Lombardis' business records relating to  
6 the licensing of the intellectual property for the last twenty-two  
7 plus years, are located in Indiana. CMG also argues that any  
8 documents pertaining to the case, the alleged breach, and CMG's  
9 alleged fraud, would likely be located in Indiana. Although CMG  
10 states that to the extent plaintiff's records, whatever they may  
11 be, are necessary, they can be converted to electronic format and  
12 be accessed in Indiana easily and cheaply, CMG does not explain why  
13 the same electronic formatting or scanning cannot be applied to its  
14 documents.

15 Plaintiff disagrees that the majority of the evidence is in  
16 Indiana and argues that evidence pertaining to liability is likely  
17 divided between the two states and what little evidence there is  
18 pertaining to damages is located in Oregon.

19 As noted above, this does not appear to be a document-  
20 intensive case. Documents are located in both Indiana and Oregon.  
21 There appears to be no obstacle to electronic conversion of the  
22 documents wherever they are located.

23 As to witnesses, it does not appear that the majority of  
24 witnesses are in Indiana. Plaintiff's witnesses (employees of  
25 plaintiff as well as those at the advertising firm with which Nike  
26 worked on the advertisement), reside in Oregon. The other two  
27 named defendants do not reside in Indiana and they prefer that the  
28 case stay here. Vince Lombardi, Jr. states he lives in Washington.

1 Lombardi Obj. to Motion to Change Venue at p. 1; but see Defts'  
 2 Mem. at p. 22-23 (indicating that Vince Lombardi lives in Green  
 3 Valley, Arizona or Easton, Washington, and Susan Lombardi lives in  
 4 Lake Placid, Florida). Susan Lombardi does not say where she  
 5 lives, but states it is unlikely she would come to trial as she has  
 6 no relevant evidence. Id.

7 As explained above, one of CMG's witnesses is in California  
 8 and two are in Indiana. The fourth, Enfield, resides, according to  
 9 counsel for the Lombardis, in Indiana.

10 CMG contends that it is easier for its witnesses and the  
 11 Lombardis to travel to and from Indianapolis as there are multiple,  
 12 daily non-stop flights from Los Angeles, Orlando, and Washington,  
 13 to Indianapolis while there are no non-stop flights from  
 14 Indianapolis, Tucson, or Lake Placid, Florida, to Portland. Deft's  
 15 Mem. at p. 23; see also Theodore Minch May 3, 2010 Declr. at ¶ 3  
 16 (stating from reviewing flight information at [www.travelocity.com](http://www.travelocity.com),  
 17 there appear to be no direct flights between Indianapolis,  
 18 Orlando, or Tucson, and Portland). CMG also argues that its  
 19 witnesses would not be as inconvenienced by travel to Indiana as  
 20 they would by travel to Oregon because they would be able to work  
 21 out of CMG's offices in Indianapolis, resulting in minimal  
 22 disruption of daily responsibilities. I note, however, that should  
 23 plaintiff's witnesses be required to travel to Indiana, they would  
 24 suffer disruption of their daily responsibilities.

25 CMG states that because Enfield, who was charged by CMG with  
 26 oversight for the Lombardi account, is no longer employed by CMG,  
 27 he would therefore "not likely be" subject to the subpoena power of  
 28 this Court. CMG contends it would be prejudiced by the inability

1 to get Enfield to court in Oregon to testify on CMG's behalf.  
 2 During oral argument on the motion, however, counsel for the  
 3 Lombardis represented that Enfield would voluntarily travel to  
 4 Oregon for deposition and trial.

5 CMG has to show that the transfer does more than merely shift  
 6 inconvenience. E.g., Decker Coal, 805 F.2d at 843. Additionally,  
 7 generally, a plaintiff's choice of forum is given considerable  
 8 weight. E.g., Lou v. Belzberg, 834 F.2d 730, 739 (9th Cir. 1987)  
 9 (plaintiff's choice of forum is given "great weight.").

10 CMG cites to cases from the Northern District of Illinois and  
 11 the Southern District of Illinois to argue that while plaintiff's  
 12 choice of forum is usually a strong factor favoring the chosen  
 13 forum, when that forum is not the "situs of material events," or  
 14 has a relatively weak connection to the events, plaintiff's chosen  
 15 forum is entitled to less deference. CMG Worldwide, Inc. v.  
16 Bradford Licensing Assocs., No. 1:05-cv-0423-DFH-TAB, 2006 WL  
 17 3248423, at \*4 (S.D. Ind. 2006) ("Where the plaintiff's choice of  
 18 forum is not the situs of the material events, or has a relatively  
 19 weak connection to the events, plaintiff's chosen forum is entitled  
 20 to less deference"); International Truck & Engine Corp. v. Dow-  
21 Hammond Trucks Co., 221 F. Supp. 2d 898, 904 (N.D. Ill. 2002)  
 22 (noting that "[p]laintiff's choice of forum is entitled to  
 23 substantial weight, particularly when it is also its home forum[,]"  
 24 but further noting that "when the conduct and events giving rise to  
 25 the cause of action did not take place in the plaintiff's selected  
 26 forum, the plaintiff's preference has minimal value") (internal  
 27 quotation omitted).

28 These cases are distinguishable because the allegations here

1 do not support a "weak" connection between CMG's alleged actions  
2 and Oregon. The negotiations for the license agreement took place  
3 via email between Oregon and Indiana. CMG's alleged  
4 misrepresentations were directed at plaintiff in Oregon and its  
5 harm was felt here in Oregon. These facts do not negate the  
6 considerable weight given to plaintiff's choice of forum.

7 Overall, the private factors are either neutral or favor  
8 plaintiff.

## 9 II. Public Factors

10 As noted earlier, the data regarding case disposition in  
11 Oregon and the Southern District of Indiana show about an equal  
12 timeline. Court congestion is slightly higher in Indiana.

13 Oregon law is likely to apply to the case whether it is tried  
14 in Oregon or in Indiana and thus, the law of the forum state will  
15 be applied only if the case remains in Oregon. There is no  
16 conflict of law argument. Plaintiff contends that trying the case  
17 here will not unfairly burden citizens of an unrelated forum with  
18 jury duty because plaintiff is based here, signed the license  
19 agreement here, and was damaged by CMG's alleged actions here.

20 CMG argues that the legal issues are not complex and both  
21 breach of contract and fraud claims exist under Indiana law so that  
22 the Southern District of Indiana is familiar with the legal  
23 concepts at issue. CMG also argues that Oregon has little or no  
24 relation to this controversy other than plaintiff being a resident  
25 of Oregon. CMG argues that because the Lombardis' licensing  
26 activities over the past twenty-three years have been conducted in  
27 the Southern District of Indiana, and because CMG is located there,  
28 the Southern District of Indiana is more closely related to the

1 controversy than the District of Oregon.

2 Both Oregon and Indiana have a connection to the controversy  
3 by virtue of plaintiff's and CMG's respective residences. While  
4 this factor is probably neutral, the other public factors favor  
5 plaintiff.

6 CMG has not made a compelling case to transfer the case to  
7 Indiana.

8 CONCLUSION

9 Defendant CMG's motion to dismiss or alternatively to transfer  
10 (#11) is denied.

11 IT IS SO ORDERED.

12 Dated this 11th day of August, 2010.

13  
14  
15 /s/ Dennis James Hubel  
16 Dennis James Hubel  
United States Magistrate Judge  
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